In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-676

BOWMAN TRANSPORTATION, INC.,
Appellant,

vs.

ARKANSAS-BEST FREIGHT SYSTEM, INC., et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS,
FORT SMITH DIVISION

JURISDICTIONAL STATEMENT
Of Bowman Transportation, Inc.

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November 5, 1975

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TABLE OF CONTENTS

APPENDICES

Citations

CASES

STATUTES

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OPINIONS BELOW

This is an appeal from the Opinion and Judgment of a Three-Judge Court in the United States District Court, Western District of Arkansas, Fort Smith Division, dated and filed on September 2, 1975, copy of which Judgment and Order is attached to this Jurisdictional Statement as Appendix A, rendered on remand from the decision of the Supreme Court in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., et al.*, 419 U.S. 281, 95 S.Ct. 438, 42 L.Ed.2d 447, decided Dec. 23, 1974, rehearing denied February 24, 1975. This and prior judicial proceedings involve review of the Report and Order of the Interstate Commerce Commission (ICC), served January 24, 1972, printed at 114 M.C.C. 571-796.

JURISDICTION

This case was remanded to the Three-Judge Court in the United States District Court, Western District of Arkansas, Fort Smith Division, by the Supreme Court for the limited consideration "of one issue", 42 L.Ed.2d 455.[1] That issue was specifically defined by the Supreme Court as follows (42 L.Ed.2d 463-464):

> "In granting Bowman a certificate the Commission noted that the authority sought by Bowman exceeded that set forth in Bowman's application. The 'excess' was granted, subject to a condition precedent of publication in the Federal Register of Bowman's request for the excess authority."

Following remand, the Three-Judge District Court arrogated to itself an additional issue, not involved in this proceeding, whether

> Bowman may tack, join or combine the authority granted in this proceeding under Section 207 (49 U.S.C.A. § 307), 114 M.C.C. 571, to that authority acquired by Bowman in a separate proceeding under Section 5 (49 U.S.C.A. § 5), *Bowman Transportation, Inc.—Purchase (Part)—Alabama Highway Express, Inc.*, decided July 8, 1968 in MC-F-9921.

On September 2, 1975, the Three-Judge District Court entered an Order modifying and restricting the authority granted Bowman Transportation, Inc. (Bowman) by the ICC and judicially approved by this Court:

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1. On two occasions, the Supreme Court specifically noted that a *single* issue remains in the *Bowman* case. At 42 L.Ed.2d 455, where the Supreme Court stated the remand was "for consideration of one issue not reached by the District Court nor by this Court", and in 42 L.Ed.2d 463, where the Supreme Court added *"an issue remains"*.

> ". . . to preclude the tacking or joining of such authority with the authority acquired by Bowman Transportation, Inc., from the Alabama Highway Express, Inc., pursuant to the Commission's order of July 8, 1968, in No. MC-F-9921."

The referenced Alabama Highway Express, Inc. (AHE) rights were acquired by Bowman through purchase after hearings in the subject proceeding had been concluded and the case had been submitted to the Commission for an order. A copy of the Judgment and Order of the Three-Judge District Court is attached to this Jurisdictional Statement as Appendix A. Bowman filed its Notice of Appeal to the Supreme Court from the Judgment and Order of the District Court on September 22, 1975.

The jurisdiction of this Court to review the judgments of the District Court on direct appeal is conferred by 28 U.S.C.A. 1253 and 2101(b). *American Trucking Associations, Inc.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 18 L.Ed.2d 847, 87 S.Ct. 1608, reh. den. 389 U.S. 889, 19 L.Ed.2d 197, 88 S.Ct. 11, 12; *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1, 4 L.Ed.2d 1527, 80 S.Ct. 1570; *United States* v. *Dixie Highway Express, Inc.*, 389 U.S. 409, 19 L.Ed.2d 639, 88 S.Ct. 539; *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., et al.*, 419 U.S. 281, 95 S.Ct. 438, 42 L.Ed.2d 447, dec. Dec. 23, 1974, reh. den. Feb. 24, 1975.

THE STATUTES INVOLVED

The statutes involved are set out in Appendix B attached. The principal statutes involved are Section 207 (a), The National Transportation Policy, preceding § 1, 49 U.S.C.A. § 307(a) and § 301 note.

THE QUESTIONS PRESENTED

The basic questions here involved are as follows:

1. Can a Three-Judge District Court modify a certificate granted a motor carrier by the ICC and judicially approved by the Supreme Court by ordering the ICC to impose a restriction against tacking the authority granted with authority subsequently purchased by the carrier with Commission approval?

2. Can a Three-Judge District Court, in a proceeding remanded by the Supreme Court for determination of a defined issue, use the remand to modify and restrict the grant of a motor carrier certificate by the ICC, judicially approved by the Supreme Court, by ordering the Commission to impose a restriction against tacking or joining the authority granted with authority subsequently acquired where the tacking issue was not involved, and the tacking restriction included rights never questioned?

STATEMENT

Or remand, the Three-Judge District Court substantially modified the certificate granted Bowman by the ICC and judicially approved by the Supreme Court by *ordering* the Commission to impose a restriction on the authority judicially approved to prohibit tacking the authority with that subsequently acquired through purchase by Bowman with Commission approval.

The factual background of this case and the purpose of the remand to the Three-Judge District Court is clearly and accurately stated in the prior decision of the Supreme

Court in this case. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., et al., supra.*

While the District Court expressed concern in its original decision "about the considerable lapse of time between the conclusion of the evidentiary hearings and the Commission's decision" 364 F.Supp. at 1261-1262, it here *ordered* the Commission to impose a restriction against tacking operating rights not acquired until a year *after* the hearings in this proceeding had closed and principally at the request of a carrier (Arkansas-Best Freight System, Inc. [ABF]) that did not acquire competing rights until *over three years after* the Bowman acquisition of the AHE rights.

It was the position of the United States, the ICC and Bowman, on remand, that the issue of tacking the authority granted under § 207 in the subject proceeding with the authority purchased by Bowman from AHE and approved by the Commission under §§ 5 and 212(b) was not involved, but the Three-Judge District Court "piggy-backed" this isue to that made the basis of the Federal Register (FR) republication and remand. The issue of tacking these separate grants of authority was first raised by ABF on March 27, 1972 in its Petition to Intervene in the Bowman Sub-No. 56 proceeding after it had previously withdrawn its protest and appearance during the hearings on June 15, 1967, and after it had acquired the operating rights of Youngblood Truck Line, Inc. effective October 14, 1971. The Commission denied the Petition for Intervention for the four reasons set out on page 6 of its Order of September 6, 1972, copy attached as Appendix C.

The right of a motor carrier to "tack" or join separate grants of authority are well established. A regular route certificate carries with it the right to tack unless there is a specific restriction in the certificate against such right.

Transport Corp. of Virginia, Extension—Maryland, 43 M.C.C. 716, 719 (1944); *M. J. O'Boyle & Son, Inc., Interpretation of Certificate,* 52 M.C.C. 248, 250; *Aero-Mayflower Transport Co., Inc.* v. *United States,* 95 F.Supp. 258, 262. The District Court ordered the Commission to disregard this well established rule and Commission policy and to modify the authority judicially approved by this Court to include a restriction affecting operating rights not acquired until over a year following conclusion of the hearings.

The pertinent dates to a consideration of this issue are as follows:

June 12, 1965 —Application filed by Bowman.

October 19, 1965 —Notice of Bowman application published in the FR, pages 10311-12.

March 21, 1966 —Hearings commenced on the consolidated applications.

June 15, 1967 —ABF withdrew its protest to the Bowman application.

August 24, 1967 —Hearings on consolidated applications concluded.

November 1, 1967—Notice of application, Bowman—Purchase (part)—AHE published in FR.

August 15, 1968 —Bowman—Purchase (part)—AHE application approved by Commission—MC-F-9921.

May 26, 1971 —Notice published in FR of application ABF—Control and Merger—Youngblood Truck Line, Inc. (Youngblood).

October 14, 1971 —Order approving application—ABF—Control and Merger—Youngblood.

January 24, 1972—Order of Commission approving Bowman Sub-No. 56 application (114 M.C.C. 571-796).

February 24, 1972—Notice of Bowman Sub-No. 56 republished in FR, pages 3935-3936.

March 27, 1972 —Petition of ABF to intervene in Bowman Sub-No. 56.

October 2, 1972 —Commission Order, served October 6, 1972, denying Petition to Intervene and for Rehearing.

After hearings were concluded in the subject Sub-No. 56 proceeding and while the consolidated cases were pending before the Commission, Bowman entered into a contract to purchase a part of the operating authority of AHE in Docket MC-F-9921. Almost *four years later*, the plaintiff, ABF, entered into a contract to acquire Youngblood under Docket MC-F-11179. The Bowman application was approved by the Commission on August 15, 1968. The ABF acquisition of Youngblood was approved *over three years later* on October 15, 1971. The Bowman purchase of AHE authorized an extension of its operating rights and service

> Between Birmingham, Alabama and points within a radius of 65 miles thereof, on the one hand, and, on the other, Louisville, Ky., points in Indiana and Tennessee and defined areas of Ohio, Illinois and Florida.

A map showing the area of this acquisition is attached as Appendix D. The ABF acquisition extended its authority into North Carolina, South Carolina, West Virginia, Kentucky and points in Ohio and Illinois. A copy of the map filed by ABF in its application to approve its acquisition of Youngblood is attached as Appendix E. The Youngblood operating rights were "tacked" by ABF to its authority to

provide through service. The Commission Order approving the Youngblood acquisition was silent on the question of tacking.

Obviously, the issue of ABF "tacking" its Youngblood acquisition and Bowman "tacking" its AHE authority were not involved in the subject proceeding because both acquisitions occurred long *after* the hearings were concluded in this case.

In its Petition for Leave to Intervene filed March 27, 1972, ABF states that:

> "Subsequent to the original proceedings in Sub 56, ABF acquired the operating rights of Youngblood Truck Line, Inc."

It might have added that its acquisition of Youngblood occurred *over four years after* hearings were concluded in this case and over *three years after* consummation of the Bowman purchase of a part of AHE. Thus, the Three-Judge District Court *retroactively* imposed a restriction on operating rights on the basis of an acquisition which admittedly occurred more than *three* years after the latest proceeding relating to Bowman.

A Motor Carrier Can Tack Separate Grants of Authority Providing There Is a Point of Service Common to Both and the Physical Operations Are Rendered Through Such Common Point

The right of a motor common carrier to "tack" or "combine" separate grants of authority is well established. The general rule, consistently followed by the Commission was clearly expressed in the early case of *Transport Corp. of Virginia Extension—Maryland*, 43 M.C.C. 716, 719 (1944) as follows:

> "It is well settled that regular-route motor common carriers may operate over all combinations of their separately described routes and between all authorized points thereon, unless their service is specifically restricted in some particular. Powell Bros. Truck Lines, Inc.—Purchase—Bryan, supra. The same principle has been applied to regular-route common-carrier operations acquired by purchase, merger, or in proceedings under section 207(a) of the act. Days Transfer, Inc.—Purchase—Haner, 39 M.C.C. 339; Dixie Freight Lines, Inc., Common Carrier Application, 24 M.C.C. 780. And, it has been held generally in motor-carrier proceedings under sections 5 and 212(b) of the act that where common-carrier regular-route and irregular-route authorities, or two or more common-carrier irregular-route authorities, are unified for operation by one carrier, through service may be provided between authorized points in both of such authorities, unless the public interest requires the imposition of a restrictive condition against the rendition of through service in whole or in part. The only requirement in these instances has been that there must be a point of service common to both operating authorities and the physical operation must be rendered through such common point. Carolina Freight Carriers Corp.—Purchase—Edmunds, 36 M.C.C. 259, B. & E. Transp. Co., Inc.—Purchase—Merchants Transp., Inc., 36 M.C.C. 561; and Consolidated Freightways, Inc.—Purchase—Pacific I. Exp., 38 M.C.C. 577."

The no-tacking restriction imposed by the District Court would have the impractical and wasteful effect of requiring Bowman to interline freight with another carrier moving between its Sub-No. 56 authority, on the one hand, and, on the other, the Alabama Highway territory instead

of handling direct as it would be authorized to do absent such restriction which the District Court ordered the Commission to write into the certificate to be issued Bowman. Specifically, Bowman will hold authority under its Sub-No. 56 grant to originate shipments at Dallas, Texas, destined to Akron, Ohio. Absent the tacking restriction, Bowman can transport that freight from origin to destination by tacking the two separate grants of authority at Birmingham, Alabama. The tacking restriction would require Bowman to interline that traffic with another carrier at Birmingham for transportation by the other carrier to Akron, or another carrier would have to originate the shipment at Dallas, transport it to Birmingham and interline it to Bowman which would then transport the shipment to Akron. The shipment, in either event, would move through interline service which was the subject of major complaints in this record leading to approval of the applications. Additionally, the unit transporting the freight from Dallas to Birmingham or from Birmingham to Akron may move over the highway alongside a unit of Bowman, traveling over the identical route, at the same time. That is the wasteful and unreasonable situation which the Commission's tacking policy avoids as an essential part of the National Transportation Policy.

The Three-Judge Court imposed restriction, without Commission review, would freeze into the authority granted and approved by this Court operating deficiencies which the Commission was endeavoring to eliminate in the grants, including carrier imposed tariff restrictions, delays incident to interline and multiple handling of shipments.

Equally persuasive of the issue here involved are acquisitions and extension of Johnson Motor Lines, Inc. and Jones Truck Line, Inc., two of the other successful applicants in this consolidated proceeding. All dates relative to the Bowman Sub-No. 56 application, above noted, were applicable to the Johnson Sub-No. 18 application. On October 18, 1968, in MC-F-1009, Johnson acquired the rights of Richards Freight Lines, Inc.[2] The certificate was issued on July 9, 1971, and Johnson now performs single-line service via the Atlanta and New Orleans gateways between points in the Richards authority and points on its Sub-No. 18 rights. Additionally, on December 18, 1972, Johnson filed its Sub-No. 34 application which was granted on February 28, 1974, authorizing specific commodity authority from Wayne County, North Carolina, to ten states. Johnson is now tacking that authority to perform service from its Sub-No. 34 origin points to its Sub-No. 18 territory. A map of the Johnson authority granted in its Sub-No. 18 consolidated application with subsequently acquired authority is attached as Appendix F.

Likewise, Jones, which also received a grant in the consolidated proceedings, acquired additional authority through the purchase of M-X Express (MC-F-11516) during the pendency of the consolidated application and is today operating those additional rights with the authority received in its Sub-No. 67 application.

Hundreds of additional instances can be cited to illustrate and emphasize that

> Where a carrier holds two separate grants of authority which have a point common to both the carrier can join or track the separate grants to provide a through service.

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2. Authorizing service to Scranton, Pa., Atlantic City, N.J., Harrisburg and Erie, Pa., New York City, Glens Falls, Oswego, Rochester and Buffalo, N.Y.

In *Chemical Tank Lines—Control and Merger*, 87 M.C.C. 333, 338, the Commission emphasized that:

> "Generally, restrictions on operating rights create undesirable problems of interpretation and operating complications and should not be imposed except where the record conclusively shows that they are necessary in the public interest."

If AHE had retained its certificate until the Sub-No. 56 authority was issued, AHE and Bowman could have established through service and joint rates between the Sub-No. 56 territory and the AHE territory. If they had not done so "the Commission in the interest of coordinating the National Transportation Policy could have required that be done". See *Century-Matthews Motor Freight* v. *Thrun* (1949, 8 CCA), 173 F.2d 454, 457. In *Cooper Transfer Co., Inc. Ext.—Jacksonville, Fla.*, 115 M.C.C. 324, Cooper filed an application seeking to extend its existing authority between (1) Jacksonville, Florida and Thomasville, Georgia over a described route, and (2) between Jacksonville, Florida and the junction of Interstate Highway 10 and U.S. Highway 19, over Interstate Highway 10, serving no intermediate points, at which latter point it would tack with its existing authority over a far reaching regular route system extending between Thomasville and numerous points in the States of Florida, Georgia, Alabama and Louisiana, including Pensacola, Florida, Mobile, Alabama and New Orleans, Louisiana. In that case, the Commission stated:

> "In an application proceeding of this type, the authority being granted will not be restricted against tacking with the applicant's existing operating rights, notwithstanding that no specific public need has been shown for such overhead operations, unless protesting carriers conclusively demonstrate that their operations would otherwise be materially adversely affected. See Eldon Miller, Inc.—Ext.—Liquefied Chemicals, 73 M.C.C. 538, 540, and Rawlings, Ext.—Emporia, 76 M.C.C. 636, 637."

As noted, Bowman's acquisition of part of the AHE rights was approved by the Commission over fourteen months after conclusion of all hearings in the subject proceeding. Notice of intent to tack the AHE authority obviously could not have been included in the Sub-No. 56 application which was filed and noted over three years before the AHE application. It was included in all pleadings filed after the acquisition and one of the original plaintiffs in this proceeding, Braswell Freight Lines, Inc.[3] protested the purchase application on the sole bases that "Bowman would not have to interline traffic" such as Braswell was then doing from Chicago.

In *Dallas & Mavis Forwarding Co., Inc. Ext.*, 84 M.C.C. 731, the Commission considered a case closely analogous to the issue here involved. There, a protestant urged that the Commission should restrict the authority sought against tacking with subsequently acquired authority, pointing out that the applicant had a Section 5 purchase application pending. Likewise, in the case here pending, Bowman subsequently acquired a part of the operating authority of AHE. In the *Dallas & Mavis case*, the Commission refused to impose the restriction, stating:

> "Although a protestant contends that we should impose a restriction against tacking which is also appli-

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3. Braswell, like 7 other original plaintiffs, withdrew. See *West Brothers Extension*, 98 M.C.C. 572, 574: "This withdrawal of protests and opposition is an indication that existing motor carriers do not expect to suffer any material detriment from a grant of the authority sought."

cable to authority hereafter acquired by the respective applicants, we do not agree. Rather, we believe that the issue should properly be decided at the time and in the proceeding involving the acquisition of such additional authority. Compare T. T. Brooks Trucking Co., Inc., Conversion Application, 81 M.C.C. 561, 573."

It is the general policy and practice of the Commission to refuse to impose tacking restrictions.

The rule against imposing a tacking restriction has been so firmly established and uniformly applied that the Commission has refused to impose such a restriction even where the applicants, as a result of stipulations with protestants, have agreed to accept such restrictions.

In *Convoy Co.* v. *United States,* 200 F.Supp. 10, 13, the Court stated:

"The Commission's conclusion that restriction of authority granted against interline movements or tacking was not warranted, being supported by the record, the fact that there was no direct evidence introduced to show the need for interline service for the combining of applicant's existing authority with that granted would not require the Commission to issue tacking or interline restrictions in the order. The Commission's findings should be assigned the respect due to judgments of a tribunal appointed by law and informed by experience."

The Right of Tacking Is a Matter for the Commission and Its Decision Thereon Will Not Be Disturbed by the Courts Unless It Is Wrong As a Matter of Law

In *Wilson* v. *United States,* 114 F.Supp. 814, 821, the Three-Judge Court stated:

> *"The right of 'tacking' authority is a matter wholly within the competence of the Interstate Commerce Commission and its resolution of such a right will not be disturbed unless it is established as being misapplied as a matter of law."* (Emphasis supplied).

Here, the judgment of the Three-Judge District Court, ordering the Commission to impose a no-tacking restriction

—Ignores the basic rule uniformly applied by the Commission and the courts that a carrier normally can tack any granted authority with that which it already holds, or with that subsequently acquired.

—Imposed a restriction which the Commission did not do in this proceeding or in the AHE purchase case.

—Destroyed a property right of Bowman in the AHE authority, notice of which was duly published in the FR during the pendency of this proceeding.

—Applied one rule to Bowman and another to Jones, Johnson and ABF, each of which is tacking subsequently acquired authority.

The Restriction Ordered by the District Court Exceeded the Area Involved and That Requested by the Plaintiffs

The judgment of the District Court *ordering* the Commission to impose a restriction "to preclude the tacking or

joining" of the Sub-No. 56 authority, here involved, with the subsequently acquired authority by Bowman from AHE is broader than that sought by the plaintiffs or considered by the District Court. There is a complete dichotomy and variance between the issue considered by the District Court and its order. In its opinion, the District Court stated (p. 12):

> ". . . ABF prayed that the Commission restrict the authority granted to Bowman to preclude the handling of traffic between the points on routes in Sub 56 on the one hand and on the other to all points and places in the States of Illinois, Indiana and Ohio.
>
> . . . The 'previously granted' authority did not authorize Bowman to operate in the States of Ohio, Indiana and Illinois. . . .
>
> Defendants have argued that plaintiffs should have protected their interests by opposing Bowman's application to purchase from Alabama Highway Express authority to operate in the States of Ohio, Indiana and Illinois."

And on page 10 of its Order, the District Court further stated:

> "By virtue of this purchase Bowman was authorized to serve points in Indiana, Tennessee, Illinois and Ohio.
>
> . . . Shown in green (Bowman map, Appendix D) is the area acquired from Alabama Highway Express situated in the States of Indiana and Illinois.
>
> A comparison of the ABF map with the Bowman map shows that now as a result of the grant in Sub 56 Bowman can handle traffic originating and destined

> to the States of Texas, Louisiana, Mississippi and Arkansas on the one hand, and parts of Illinois, all of Ohio, and all of Indiana on the other."

It appears that the District Court intended to order the restriction imposed against the movement of traffic between the subject Sub-No. 56 proceeding, on the one hand, and, on the other, the Bowman authority in "Ohio, Indiana and Illinois" which was subsequently acquired by purchase from AHE. However, the Order of the Court went much further and beyond any issue raised or considered by the District Court, because the authority acquired by Bowman from AHE included additional rights in Tennessee and a defined part of Florida which the District Court ordered to be restricted. No issue was raised with respect to these states and the District Court never considered them. The record in this case clearly shows the authority which Bowman acquired. In the Recommended Report and Order of the Examiners, served November 19, 1969, they noted (Sheet 25):

> "NOTE: In August 1968 Bowman acquired a portion of the operating rights of Alabama Highway Express which included among other authority the transportation of general commodities (with exceptions) between Birmingham and points in Alabama within 65 miles of Birmingham, on the one hand, and, on the other, Louisville, Ky., and points in Indiana, Tennessee, and portions of Florida, Illinois, and Ohio. No. MC-F-9921, *Bowman Transportation, Inc.—Purchase (Portion)—Alabama Highway Express, Inc.* (not printed), decided July 8, 1968."

In the Bowman brief to the District Court, it was carefully noted that the Bowman purchase of AHE authorized an extension of its operating rights and service:

"Between Birmingham, Alabama and points within a radius of 65 miles thereof, on the one hand, and, on the other, Louisville, Ky., points in Indiana and Tennessee and defined areas of Ohio, Illinois and Florida."

As noted by the District Court, the objections to tacking the Sub-No. 56 grant and the AHE purchase were directed to Indiana and described parts of Ohio and Illinois, but the Judgment of the District Court went far beyond the objections and issues and *ordered* the Commission to restrict *all* the authority acquired by Bowman from AHE, including Tennessee and a defined part of Florida which was not involved or questioned.

This illustrates the judicial danger of deciding an issue not involved in this proceeding since that transaction occurred *after* hearings in this case were closed and the acquisition of Youngblood by ABF occurred over four years after the hearings in this case were concluded.

The District Court Order further emphasized the hazard of extending a limited remand order to "piggyback" a sweeping restriction which emasculates a uniform rule and policy of the Commission. It should not be allowed to stand.

CONCLUSION

Probable jurisdiction should be noted and the order directing the Commission to impose a restriction on the grant of authority which the Court previously approved should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33 of the Supreme Court of the United States, I have served a copy of the foregoing Jurisdictional Statement upon all attorneys of record by mailing copies to them, first class mail, postage prepaid, and on all parties more than 500 miles distant* by air mail, postage prepaid, to the addresses shown by them in pleadings filed, as follows:

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This 5th day of November, 1975.

/s/ MAURICE F. BISHOP

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. FS-72-C-65

ARKANSAS-BEST FREIGHT SYSTEM, et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants,

BOWMAN TRANSPORTATION, Inc.,
Intervening Defendant.

JUDGMENT

(Filed September 2, 1975)

The questions at issue as stated by the Supreme Court of the United States in its opinion of December 23, 1974, its mandate certified February 28, 1975, filed herein March 3, 1975, together with the pertinent record, the briefs and oral argument of counsel for the parties, having been fully considered and determined as set forth in the opinion of the court filed herein,

IT IS ORDERED AND ADJUDGED in accordance therewith that Bowman Transportation, Inc., is granted only the excess authority for which the Commission found

from legal and competent evidence a public need existed; and that the portion of the Commission's order that was not supported by any evidence of a public need and in regard to which there was no finding of any public need will be and the same is set aside and held for naught.

IT IS FURTHER ORDERED AND ADJUDGED that the order of this court of March 25, 1975, be modified so as to authorize the Commission to issue a certificate of public convenience and necessity to Bowman Transportation, Inc., as hereinbefore set forth with a modification restricting such authority to preclude the tacking or joining of such authority with the authority acquired by Bowman Transportation, Inc., from the Alabama Highway Express, Inc., pursuant to the Commission's order of July 8, 1968, in No. MC-F-9921.

This 2 day of September, 1975.

/s/ J. Smith Henley
Judge, United States Circuit Court

/s/ Paul X Williams
Judge, United States District Court

/s/ John E. Miller
Sr. Judge, United States District Court

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. FS-72-C-65

ARKANSAS-BEST FREIGHT SYSTEM, et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants,

BOWMAN TRANSPORTATION, Inc.,
Intervening Defendant.

Before HENLEY, Circuit Judge, WILLIAMS, Chief District Judge, and MILLER, Senior District Judge.

MILLER, Senior District Judge

OPINION ON REMAND

(Filed September 2, 1975)

Involved in the prior decision of September 11, 1973, of this court, 364 F.Supp. 1239, was the review of orders of the Interstate Commerce Commission ("the Commission") granting certificates of public convenience and necessity to Red Ball Motor Freight, Inc., Johnson Motor Lines, Inc., and Bowman Transportation, Inc. (Bowman). The Commission authorized the named carriers to extend their operations as common carriers of property over specified routes in the southeastern and southwestern portions of the United States.

On November 7, 1972, this court entered an order temporarily restraining the Commission from issuing certificates of public convenience and necessity pending final

hearing and determination of the action. Arkansas-Best Freight System v. United States, (W.D.Ark. 1972) 350 F.Supp. 539. The court at page 546 said:

> "The plaintiffs have shown that without a stay they will suffer irreparable injury. If the Certificates of Public Convenience and Necessity are issued to Red Ball, Bowman and Johnson under the authority granted in the orders questioned in this proceeding, those carriers will immediately proceed to provide service to the public in accordance with the provisions of the orders. This will necessarily cause a diversion from plaintiffs of substantial volume of traffic which they are now handling and revenue derived therefrom and inflict an irreparable injury on the business of the plaintiffs which can never be recouped even if they should prevail on the merits of the action."

In due time the case was fully briefed and orally argued. On September 11, 1973, the court filed its opinion holding that the orders of the Commission extending the operations of Red Ball, Johnson and Bowman were invalid and enjoined the enforcement thereof. 364 F.Supp. 1239.

On appeal, Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 95 S.Ct. 438, 42 L.Ed.2d 447, the Supreme Court on December 23, 1974, reversed and remanded. Rehearing denied February 24, 1975.

The Court upheld the Commission's grant of certificates to Red Ball and Johnson. It also upheld the grant of a certificate to Bowman insofar as it involved authority embraced within its application, but remanded for our further consideration the issue involving the Commission's grant of authority to Bowman that "exceeded that set forth in Bowman's application.

Relative thereto, the Supreme Court in Section V of its opinion stated:

> "Our opinion disposes of appellees' objections to the Commission's order insofar as it granted the applications of Johnson and Red Ball. As to appellant Bowman, however, an issue remains. In granting Bowman a certificate the Commission noted that the authority sought by Bowman exceeded that set forth in Bowman's application. The 'excess' was granted, subject to a condition precedent of publication in the Federal Register of Bowman's request for the excess authority. Various appellees filed objections to the augmented authority sought by Bowman, which the Commission overruled. Appellees challenged the Commission's procedure in the District Court on a variety of grounds, and though the District Court indicated disapproval of the Commission's action, the court did not have to rule on the merits of appellees' objections since it set aside the Commission's approval of all the applications.
>
> "While we have on occasion decided residual issues in the interest of an expeditious conclusion of protracted litigation, see Consolo v. FMC, 383 &.S. 607, 621, we believe that the issue of conformity of the Bowman certificate to its application is one for the District Court. The issue was not briefed or argued here, owing to the limitations set forth in our order noting probable jurisdiction. And while the District Court spoke of the Commission's action in this regard, we do not construe its expressions as a final ruling, since they were unnecessary to the District Court's disposition of the case. Accordingly, the issue remains open on remand.

"We hasten to add, however, that our remand provides no basis for depriving Bowman of authority conferred by the Commission that was within its original application."

On March 5, 1975, this court in accordance with the mandate of the Supreme Court entered an order dissolving the injunction previously entered enjoining the issuance of the certificates of public convenience and necessity to Johnson and Red Ball.

On March 25, 1975, the court considered paragraph V of the opinion of the Supreme Court, and entered the following order:

"IT IS ORDERED, THAT, pursuant to the decision and mandate of the Supreme Court of the United States in 73-1055, Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., et al., the permanent injunction previously rendered by this Court enjoining the issuance of a certificate of public convenience and necessity to Bowman Transportation, Inc. be and is hereby modified and partially dissolved to permit the issuance of a certificate of public convenience and necessity conforming to the Order of the Interstate Commerce Commission in Herrin Transportation Co., Extension—Atlanta, Georgia, 114 M.C.C. 571, except that said authority shall pending judicial determination of the issues specifically preclude the tacking, joining or combining of said authority granted in 114 M.C.C. 571 to that authority granted in Bowman Transportation Inc.—Purchase (Part)—Alabama Highway Express, Inc., decided July 8, 1968 in No. MC-F-9921, and shall further be restricted so as to preclude any authorization in said authority for service by Bowman Transporation, Inc. of the junction of U. S. Highways 11 and 80 and Interstate Highway 59 at or near Toomsuba, Mississippi for any purpose or the including of Montgomery, Alabama in the restrictive language.

"IT IS FURTHER ORDERED, THAT, this Court shall retain jurisdiction of this matter for the purpose of determining the issues of whether or not the authority granted in 114 M.C.C. 571 shall be permanently restricted to preclude the tacking, joining or combining of said authority granted in Bowman Transportation, Inc.—Purchase (Part)—Alabama Highway Express, Inc., decided July 8, 1968 in No. MC-F-9921, and shall further be restricted so as to preclude any authorization in said authority for service by Bowman Transportation, Inc. of the junction of U. S. Highways 11 and 80 and Interstate Highway 59 at or near Toomsuba, Mississippi for any purpose or the including of Montgomery, Alabama in the restrictive language.

"This Court also retains jurisdiction on issues relating to the costs taxed by the Supreme Court."

All adjudicated costs have been paid by plaintiffs.

The Bowman application is thus before the court for review on the limited issue set forth in the order of remand.

All parties have filed extensive briefs and orally argued their contentions, all of which together with applicable portions of the pleadings have been carefully considered by the court.

Counsel for the United States and Bowman state that the limited issue involves the question "Whether the Commission's grant of authority greater than that initially proposed by a motor carrier applicant after finding a public need therefore and after republication of the enlarged grant and consideration of objections thereto is lawful and cor-

rect." They also contend that this court should limit its consideration to only one portion of the authority granted by the Commission that exceeded the authority requested in the application. This court does not agree that its review is so limited. It is only necessary to read and keep in mind what the Supreme Court said in section V of its opinion as hereinbefore set forth in full.

The plaintiffs[1] contend that the grant to Bowman clearly and materially exceeded the authority that it described and set forth in its application.

At the beginning of the hearing Bowman proposed an amendment to its application which reduced rather than enlarged the scope of its application. The amendment was accepted by plaintiffs and approved by the Commission.

In considering the issue as stated by the Supreme Court in its remand, we have given careful consideration to the principles discussed and applied by the Supreme Court in its review of this court's prior decision. We have endeavored to give to the Commission's order every possible presumption of correctness and to resolve every ambiguity in a way that would support the conclusions of the agency.[2]

In this court's opinion of September 11, 1973, the court, beginning at page 1258 of 364 F.Supp. said:

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1. In addition to Arkansas-Best Freight System, Inc., the following plaintiffs, ET&WNC Transportation Co., Gordons Transports, Inc., Mercury Motors Inc., Red Line Transfer and Storage Co., Inc., T.I.M.E.-DC, Inc., Transcon Lines, Yellow Freight System, Inc., and the intervening plaintiff, Jack Cole-Dixie Highway Co., served and submitted briefs to the Commission in the various proceedings that affected their business.

2. At the time of the court's original decisions, Sept. 11 and Oct. 4, 1973, Circuit Judge Mehaffy was a member of the court. Following his retirement, Circuit Judge Henley was duly appointed to succeed Judge Mehaffy.

"The grant to Bowman, exceeding the scope of its application, was described in a Federal Register notice affording interested parties an opportunity to petition for reopening or reconsideration of that application. Several carriers, including ABF, filed timely petitions in response to the notice, based upon their interests in the Bowman grant, seeking reopening or reconsideration of the Division decision. These petitions pointed out that, while the application was pending, Bowman acquired extensive new authority, and the approved grant failed to contain any restriction preventing Bowman from performing service between points in this newly-acquired territory and points within its new grant. Since the original notice of the Bowman application specifically described its proposal to join its *then existing* authority with that sought, petitioners sought an opportunity to demonstrate the need for a modification or denial of the Bowman grant. These petitions were considered along with numerous petitions seeking reconsideration of the Division order. A total of 32 separate groups of petitions and replies thereto, some exceedingly comprehensive, were denied by a two-to-one vote of the same Division twelve working days after the last pleading was filed. (See Exhibit 5 to Complaint.)"

At page 1263 the court further stated:

> "The Division's rejection of the petition of ABF and others, seeking reopening and reconsideration of the Bowman application, does not appear compatible with the Federal Register notices describing such application. * * * The additional publication of the Bowman grant was thereby treated as a meaningless formality."

The above findings of this court are correct and based upon the undisputed facts disclosed by the entire record.

In the joint brief of the USA and the Commission the defendants contend that the Commission's decision to grant Bowman "excess" authority by including Montgomery in the gateway restriction subject to the condition precedent of republication in the Federal Register is lawful and correct; that as a matter of law republication in the Federal Register prior to the issuance of a certificate of public convenience and necessity, to advise interested parties that the Commission, upon finding a public need therefor, intends to grant authority beyond that originally noticed in the Federal Register, satisfies all notice and due process requirements, and that as a question of fact the republication of the Federal Register notice to reflect the Commission's grant of authority to Bowman to serve Montgomery, Ala., as a gateway was natural and correct, and the issue of whether Bowman may tack the certificates obtained in the instant proceeding with those purchased from Alabama Express is not properly before the court.

Counsel for defendants have called the court's attention to the testimony of several witnesses that described the movement of freight to and from Montgomery. This testimony was proffered primarily in support of some other carriers whose applications were heard on the consolidated record and was not specifically presented in support of any proposal by Bowman to serve Montgomery or to utilize the Montgomery gateway. The record shows the Bowman clearly explained at the outset of the hearing that it did not seek such authority in reference to Montgomery, and this proffered testimony would have been irrelevant to any issue presented by the application. However, in a proceeding of this type the Commission may properly consider all

evidence of record regardless of which applicant was responsible for the presentation of such evidence.

(1) The Commission granted excess authority to Bowman to serve points on the Montgomery route and to use Montgomery as a gateway, and (2) it failed to include in its restrictions a provision that would prevent Bowman from joining newly acquired authority with the authority acquired by Bowman subsequent to the hearing herein by purchase from Alabama Highway Express.

This court has concluded that by giving to the Commission's finding every possible presumption of correctness and by interpreting the findings in the light most favorable to the Commission, it can uphold the Commission's grant described as in (1) above, but not that described as (2). This conclusion is reached upon the fact that the Commission found "since the need has been shown for the use of this gateway, these defects will be cured subject to prior publication in the Federal Register." 114 M.C.C. at pages 611-12.

We now come to a consideration of the contention that Bowman may tack the authority obtained in the instant proceeding with that purchased from Alabama Highway Express. The defendants contend that the question is not before this court and that the plaintiffs are attempting to broaden the issue which was defined by the Supreme Court in its order of remand.

In the order remanding the case, the court, after stating that the issue remains as to applicant Bowman, stated:

> "In granting Bowman a certificate the Commission noted that the authority sought by Bowman exceeded that set forth in Bowman's application. The 'excess' was granted, subject to a condition precedent of pub-

lication in the Federal Register of Bowman's request for the excess authority. * * * and though the District Court indicated disapproval of the Commission's action, the court did not have to rule on the merits of appellees' objections since it set aside the Commission's approval of all the applications."

The court further said:

"We hasten to add, however, that our remand provides no basis for depriving Bowman of authority conferred by the Commission that was within its original application."

As stated by the Supreme Court, this court did not determine the question now before us in its former opinion. The court examined the record to a certain extent and made certain findings of fact but did not state any conclusion on the particular question now before the court. In its consideration the court said:

"Unless restricted voluntarily or by order of the ICC, a carrier normally can tack newly granted authority with that which it already holds, or with that subsequently acquired. Bowman limited its intention to tack the authority sought in the present proceeding to its then existing authority by the use of the following language as published in the Federal Register of Thursday, August 19, 1965, by stating '* * * with that authority previously granted * * * wherein applicant is authorized to serve points in * * *' and named sixteen (16) states and the District of Columbia. The States of Illinois, Indiana and Ohio were not named in the Federal Register publication. The published language constitutes a specific limitation regarding tacking which did not give notice to the public of any intention to tack the authority sought in the present

proceedings to authority subsequently acquired. Subsequent to the publishing of the 'Notice,' Bowman acquired Alabama Highway Express which allowed Bowman to serve points in Indiana, Illinois and Ohio. The grant of the authority in the present proceeding by the Commission, Division I, did not contain the limitation against tacking of the authority acquired in the present proceeding."

Most of the plaintiffs filed a petition similar to that of ABF for leave to intervene, to reopen and receive additional evidence, to reconsider and reverse the decision of Division I, on both the question of the use of Montgomery as a gateway and the tacking of the authority obtained in this proceeding, Sub 56, and authority that might be, or is, subsequently obtained.

Bowman filed its application for authority on June 12, 1965, in Docket MC 94201, Sub-nom 56. The initial notice was published in the Federal Register August 19, 1965. Division I on December 30, 1971, found, as evidenced by order served January 24, 1972, that present and future convenience and necessity required operation by Bowman as a common carrier of general commodities, with the usual exceptions, over certain designated routes. The republication of the revised notice appeared on February 24, 1972, at pp. 3935-36 of the Federal Register. In the republication of the notice the following statement appears:

"Because it is possible that other persons who have relied upon the notice of the application as published, may have an interest in and would be prejudiced by the lack of proper notice of the authority described in the findings in this order, a notice of the authority actually granted to applicant will be published in the Federal Register and issuance of a certificate in this

proceeding will be withheld for a period of 30 days from the date of such publication, during which period any proper party in interest may file a petition to reopen or for other appropriate leave setting forth in detail the precise manner in which it has been so prejudiced."

On November 1, 1967, Bowman caused to be published in Docket MC-F-9921 its notice for authority to purchase the operating rights of Alabama Highway Express. The purchase was consummated sometime in the month of October 1968. By virtue of this purchase Bowman was authorized to serve points in Indiana, Tennessee, Illinois and Ohio.

Bowman attached to its brief filed herein July 7, 1975, a map which shows in yellow the authority possessed by it prior to the beginning of the instant proceeding. In black is shown the Sub 56 authority acquired in the present proceeding. Shown in green is the area acquired from Alabama Highway Express situated in the States of Indiana and Illinois.

A comparison of the ABF map with the Bowman map shows that now as a result of the grant in Sub 56 Bowman can handle traffic originating and destined to the States of Texas, Louisiana, Mississippi and Arkansas on the one hand, and parts of Illinois, all of Ohio, and all of Indiana on the other.

It will be readily noted that the granting of the tacking privilege to Bowman would enable it to transport commodities in direct competition with ABF and other carriers as to points above mentioned by new authority not heretofore existing, and thus subject ABF in particular to competition by diverting from it traffic which is necessary to enable it to properly maintain and render adequate service to the public. The authority granted Bowman in Sub 56 directly conflicts with the authority held by ABF and other protestants as described opposite the granting numbered paragraphs in the Federal Register.

The plaintiff ABF, pursuant to certificate of convenience and necessity MC-29910 and subs thereof, was and is operating in and between the States of Arkansas, Louisiana, Pennsylvania, Texas, Mississippi, New York, Tennessee, Kentucky, Oklahoma, Kansas, Missouri, Iowa, Wisconsin, Indiana, Ohio, Georgia, North Carolina and South Carolina. During the time the original and substituted applications were before the Commission ABF owned and operated a total of at least 559 road tractors and 918 road trailers, and in addition owned and operated 797 units of city pickup and delivery vehicles.

In the petition to reopen the proceedings ABF and the other plaintiffs alleged that ABF was prepared to demonstrate to the Commission that as a result of the grant of authority in Sub 56 as republished over fifty percent of its tonnage and revenues would be subject to diversion, and that the Commission did not understand that the grant of Sub 56 to Bowman would authorize service that was not and could not have been contemplated at the time evidence was introduced during the hearings on the application; that by virtue of its acquisition subsequent to the taking of the testimony in Sub 56, Bowman would be granted excess authority without having introduced any evidence of public convenience and necessity.

In support of the petition to reopen the protestants contended that because of the material change in the republication of the notice that the Commission should reopen the matter and that Bowman should be required to prove by competent evidence establishing a public convenience and necessity to authorize operations which are

in conflict with the operations described in the original notice and the other protesting carriers as shown in the entire record.

In the alternative, ABF prayed that the Commission restrict the authority granted to Bowman to preclude the handling of traffic between the points on routes in Sub 56 on the one hand and on the other to all points and places in the States of Illinois, Indiana and Ohio.

In the prior opinion of this court we commented only on the terminology used in the Federal Register notice setting forth the scope of the application. The "previously granted" authority did not authorize Bowman to operate in the States of Ohio, Indiana and Illinois. On remand we have examined the question in more detail. There is nothing ambiguous in the application or in the notice describing the proposal.

Defendants have argued that plaintiffs should have protected their interests by opposing Bowman's application to purchase from Alabama Highway Express authority to operate in the States of Ohio, Indiana and Illinois. The contention is without merit and is completely answered by the record and especially by a comparison of the publication of the original notice and the republication.[3]

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3. During the preparation of this opinion, the writer, by letter of August 19, requested counsel for the parties "to supply me immediately with the title of each decision cited by them in the oral argument with the exception, of course, of the decisions that are listed and set forth in the briefs." The attorney for Bowman, Mr. Bishop, referred us to the following: Cedar Rapids Steel Transportation, Inc. v. ICC, 391 F.Supp. 181 (1975); Midwest Coast Transport, Inc. v. United States, 391 F.Supp. 1209 (1975); Baltimore and Ohio Railroad Co. v. United States, 391 F.Supp. 249 (1975); American Federation of Labor, etc., et al. v. Brennan, 390 F.Supp. 972 (1975); Nader v. Sawhill, 514 F.2d 1064 (1975); Cross v. United States, 512 F.2d 1212 (1975).

The plaintiff referred us to the decisions which we approve and discuss in our opinion.

We can find no way in which judicial approval can be given to the Commission's grant of the excess tacking authority. The requisites for a lawful grant of authority greater than that proposed in the application are (1) a finding supported by substantial evidence of a public need therefor; (2) republication of the enlarged grant so as to afford interested parties adequate notice thereof; and (3) consideration of objections thereto following republication. The absence of the establishment of each of the requisites results in depriving the person or corporation of due process.

Plaintiffs and any other interested parties were entitled to rely on the representations contained in the application. Baggett Transportation Co. v. United States, (N.D.Ala. 1962) 206 F.Supp. 835; Eagle Motor Lines, Inc. v. United States (N.D.Ala. 1971) 331 F.Supp. 80. In the latter case the court at page 82 said:

> "Terse excerpts from the specially concurring opinion of Judge Rives in Baggett Transportation Co. v. United States, 206 F.Supp. 835 (N.D.Ala. 1962) quoted in the margin,[5] while appearing in a somewhat different context, have a peculiar pertinency here.
>
> "Failure adequately to warn competing carriers of the authority actually sought and intended to be used, albeit by tacking, naturally has an injurious impact upon the integrity of the administrative process."

The note 5 referred to states:

> "5. 'The Commission must be able to rely upon the representations of the parties * * *,' and
>
> " 'However, when Baggett made its application for the transfer with the representations contained in that application, it became bound to them.' "

In Georgia-Florida-Alabama Transportation Co. v. United States, (M.D.Ala. 1968) 290 F.Supp. 764, the Commission granted authority to the defendant M.R.&R. which it did not seek in its application. In the original application and of which notice appeared in the Federal Register it sought authority to transport general commodities with exceptions between Mobile, Alabama, and Pensacola, Florida, serving no intermediate points.

At page 765 the court said:

> "The plaintiffs protested. At the outset of the hearing M.R. & R. amended its application by stipulation with the protestants with these remarks:
>
> " 'Mr. Examiner, at this point the Applicant will offer an amendment to the application in the nature of a restriction which we deem will reduce the scope of it and which incorporates some restrictions already existing and the restrictions we offer at this time are in these words: "Authority sought to be restricted against traffic moving in direct or interline service (1) Mobile and Pensacola; (2) Mobile and Jacksonville and (3) Mobile and Atlanta."
>
> " 'If I may, by way of explanation say this: the original restriction that we had proposed with respect to between Mobile and Pensacola and Mobile and Jacksonville as appeared in the notice was intended by us to cover all traffic whether it was direct or interline. In other words, Applicant didn't propose any service between these two points, that is, between Mobile and Pensacola and Mobile and Jacksonville. Now, what we have done, we have added another one between Mobile and Atlanta, another restriction and made it clear that the service proposed will not encompass any service on the

> shipments directly between the two points or interline at the two points.' "

At page 766 the court said:

> "The I.C.C. subsequently, and without giving notice to the protestants, to the public, or any further notice in the Federal Register, removed the stipulated restrictions which had been accepted and honored by the Hearing Examiner.
>
> "The plaintiffs contend that the grant of authority by the I.C.C. in excess of that sought contrary to the stipulation and amendment under these circumstances is error.
>
> "The defendants contend the I.C.C. may grant authority to a motor carrier broader than that requested by the carrier without notice to protestants or the public or without republication in the Federal Register."
>
> * * *
>
> "The I.C.C. has differentiated between a grant of authority between two terminals without tacking and the grant of authority between terminals which tack and has indicated such tacking constitutes a grant in and of itself as different and separate, a grant distinct from a grant where tacking does not occur. *'Our failure to impose a restriction to prevent tacking* (Emphasis added.) with the other authority previously held by applicant would have *exactly the same effect as a grant* (Emphasis added.), therefore, we will impose a restriction against tacking.' Tompkins Motor Lines, Inc.—Extension—Louisville, 95 M.C.C. 472, 481.
>
> "To state it another way, where tacking occurs on a new grant, two grants actually take place: (1) a grant

of authority between the two terminals and (2) a grant of authority from a new terminal to all the other areas brought into being by the tacking to a terminal which the applicant already serves under a previous grant. A much graver situation comes into being where tacking occurs, and no restrictions are made against interlining. In this case, by reason of the removal of the restrictions contained in the application, the gateways have been opened both east to west, Atlanta and Jacksonville to Mobile, and west to east, Mobile to Atlanta and Jacksonville, involving numerous competing carriers. Thus, the additional grant by reason of tacking and the removal of the restriction constitutes a grant not contemplated by the application which could adversely and materially affect the operation of other authorized carriers. The I.C.C. has noted the seriousness of such circumstances:

"'In appropriate circumstances restrictions against interline and tacking at origin and/or destination points have been imposed. These instances evolve when grants of authority are tied closer to the applicants existing operations and where tacking and interchange would result in additional competitive operations which are not contemplated and which *would adversely and materially affect* the operation of other authorized carriers. Riss and Co., Inc., Ext—Dakota County, Nebr., 102 M.C.C. 336, 343. On occasion, the service restriction may also be allowed for such *compelling reasons* as the agreement of the parties that protestants would be *materially and adversely* affected by their omission. No. MC-61755 (Sub-No. 20), Northern Haulers, Corporation Extension—St. Lawrence County, N.Y.' (Emphasis added.) Fox-Smythe Transportation Co., Ext—Oklahoma, 106 M.C.C. 1, 18.

"The stipulated restrictions, recognized and honored by the Hearing Examiner, and the withdrawal or inaction thereafter by the protestants *implies a recognition* by all that the proceeding without the restriction *could materially and adversely affect* the protestants. Notice to interested persons and their right to be heard are basic concepts of justice under law. It would be manifestly unfair and unjust to these plaintiffs and other interested parties for this court to permit them to be lulled into a false sense of security, protection, and inaction by allowing the Commission to remove the restrictions in the amended application without the interested parties and the public having been given notice by publication in the Federal Register so they could be heard."

The court then discussed cases where the Commission had broadened the grant of authority beyond that sought in the application, and on page 768 said:

"Without approving, but noting these cases, we should not extend the practice of broadening a grant of authority over that sought beyond these limited instances to a case with the extensive ramifications of the case at bar."

In May Trucking Co. v. United States, (D.Idaho 1968) 290 F.Supp. 38, the court at page 39 said:

"It is undisputed that the Commission erroneously issued a certificate to plaintiff granting interstate authority to plaintiff greater and different in scope than that applied for by plaintiff, and likewise greater than that indicated in the notice of application printed in the Federal Register.

"By and through the Order appealed from, the Commission seeks to correct its admitted error and

grant to the plaintiff the authority which plaintiff sought in its application. Plaintiff contends the Commission does not have the authority to correct such an error. We do not agree. We are of the opinion that the Commission has the power to correct its manifest error by canceling the outstanding certificate issued to plaintiff and reissuing a modified certificate granting the operating rights originally applied for by the plaintiff. The record before us clearly shows that the Commission has correctly exercised such power."

In Curtis, Inc. v. United States, (D.Colo. July 21, 1975) (not published), a three-judge court said:

"In this action Curtis seeks an order setting aside and annulling orders of the ICC entered in the Commission's proceeding No. MC-113678 (Sub-No. 285), Curtis, Inc., Extension—Meats Over Irregular Routes. The specific order which is attacked is the modification by the Commission of the certificate theretofore issued, Sub-No. 285, which modification imposed a no tacking restriction.

"The problem arose out of proceedings which started in 1967, at which time Curtis filed an application for new operating authority to transport over irregular routes. Curtis at that time held regular route authority to serve these points. This application was not designed, according to the application, to duplicate authority already given but, rather, to supplement it. Curtis did answer the question in the application regarding whether the authority sought could be tacked with the response 'Yes.' However, Curtis declined in further responses to indicate the points or areas where the operation would connect and the territory to be served by such joinder. It referred in an appendix to other and additional authority. In the

notice in the Federal Register no reference was made to the tacking possibilities raised by the application.

"The issuance of the Sub-285 authority was opposed by Ringsby Truck Lines, Inc., Midwest Emery Freight System, Inc. and Little Audrey's Transportation Company, Inc., but the tacking issue was never raised expressly. This opposition was withdrawn when Curtis gave assurance that it sought no new territory or commodity authority. One carrier, Frozen Food Express, Inc., specifically opposed the tacking, but withdrew its objection after correspondence with Curtis' counsel."

* * *

"Finally, in February 1974, the certificate was reissued with a no-tacking restriction. The sole question presented on this review is, as we view it, whether the Commission was empowered to modify its original order in order to correct any mistake. We conclude that it was so authorized. We further conclude that the Commission's ruling after the cause was reopened was fully supported."

* * *

"As we view the situation at bar the Commission acted within the law. It had a clear right to correct the mistake which occurred in connection with the initial grant of authority by imposing, the limitations against tacking, and we perceive no necessity for the existence of fraud or deception. To hold otherwise would give to Curtis an unfair advantage based upon mutual mistake of fact. Unquestionably the opposition carriers would have vigorously objected to the issuance of the Sub-285 authority had they known that it was to be used in the manner in which it was used follow-its issuance. We perceive no error in the Commission's

subsequent proceedings and we see no necessity for specifically considering the conduct of these hearings."

CONCLUSIONS

The Supreme Court in its opinion of December 23, 1974, granted to Bowman all operating authority embraced within the scope of its application as filed and presented to the Commission. By our decision today we hold that Bowman should be granted only the excess authority for which the Commission found from legal and competent evidence a public need existed.

We set aside as invalid only that portion of the Commission's order that granted Bowman excess authority that was and is not supported by any evidence of public need and in regard to which there was no finding of any public need.

Accordingly, judgment is being entered today modifying our order of March 25, 1975, so as to authorize the Commission to issue a certificate of public convenience and necessity to Bowman Transportation, Inc., as authorized by the Commission in the action under review, with a modification restricting such authority to preclude the tacking or joining of such authority with the authority acquired by Bowman from Alabama Highway Express, Inc., pursuant to the Commission's order of July 8, 1968, in No. MC-F-9921.

This 2 day of September, 1975.

/s/ J. Smith Henley
Judge, United States Circuit Court

/s/ Paul X Williams
Judge, United States District Court

/s/ John E. Miller
Sr. Judge, United States District Court

APPENDIX B

(3) 49 United States Code Annotated, Sections 307(a) and (b).

§ 307. Issuance of certificate—Issuance authorized to qualified applicants for regular routes and between fixed termini

(a) Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Certificate not to confer proprietary or property rights in highway

(b) No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways. Feb. 4, 1887, c. 104, Pt. II, § 207, as added Aug. 9, 1935, c. 498, 49 Stat. 551.

(1) 49 United States Code Annotated, preceding §1 note, §301 note, §901 note, and §1001 note.

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

APPENDIX C

SERVICE DATE
SEPTEMBER 6, 1972

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, Acting as an Appellate Division, held at its office in Washington, D.C., on the 1st day of September, 1972.

No. MC-1124 (Sub-No. 206)
HERRIN TRANSPORTATION COMPANY EXTENSION—
ATLANTA, GA.
(Houston, Tex.)

(Reentitled)
McLEAN TRUCKING COMPANY EXTENSION—
ATLANTA, GA.
(Winston-Salem, N.C.)

No. MC-2229 (Sub-No. 132)
RED BALL MOTOR FREIGHT, INC., EXTENSION—
ATLANTA, GA.
(Dallas, Tex.)

No. MC-11207 (Sub-No. 233)
DEATON TRUCK LINE, INC., EXTENSION—
DALLAS, TEX.
(Birmingham, Ala.)

(Reentitled)
DEATON, INC., EXTENSION—DALLAS, TEX.
(Birmingham, Ala.)

No. MC-18088 (Sub-No. 36)
FLOYD & BEASLEY TRANSFER COMPANY, INC.,
EXTENSION—DALLAS, TEX.
(Sycamore, Ala.)

No. MC-59680 (Sub-No. 147)
STRICKLAND TRANSPORTATION CO., INC.,
EXTENSION—ATLANTA, GA.
(Dallas, Tex.)

No. MC-76177 (Sub-No. 304)
BAGGETT TRANSPORTATION COMPANY
EXTENSION—DALLAS, TEX.
(Birmingham, Ala.)

No. MC-94201 (Sub-No. 56)
BOWMAN TRANSPORTATION, INC., EXTENSION—
DALLAS, TEX.
(East Gadsden, Ala.)

No. MC-106401 (Sub-No. 18)
JOHNSON MOTOR LINES, INC., EXTENSION—
DALLAS, TEX.
(Charlotte, N.C.)

No. MC-111231 (Sub-No. 67)
JONES TRUCK LINES, INC., EXTENSION—
ATLANTA, GA.
(Springdale, Ark.)

Upon consideration of the record in the above-entitled proceedings, and of:

(1) Protest-representation and request for oral hearing of Colonial Refrigerated Transportation, Inc., in No. MC-94201 (Sub-No. 56), filed March 17, 1972,

pursuant to publication of grant of authority in the February 24, 1972, issue of the Federal Register, treated as a petition for leave to intervene embracing request for further hearing;

(2) Petition of Colonial Fast Freight Lines, Inc., in No. MC-94201 (Sub-No. 56), filed March 20, 1972, pursuant to publication noted in (1) above, for leave to intervene;

(3) Petition of Bell Transfer Company, Inc., in No. MC-94201 (Sub-No. 56), filed March 22, 1972, pursuant to publication noted in (1) above, for reopening the proceeding for further hearing;

(4) Petition of Southern Forwarding Company, in No. MC-94201 (Sub-No. 56), filed March 24, 1972, pursuant to publication noted in (1) above, for (a) leave to intervene, (b) reopening for further hearing, and (c) reconsideration in light of evidence to be adduced at the further hearing;

(5) Petition of Atlas Transit, Inc., in No. MC-94201 (Sub-No. 56), filed March 24, 1972, pursuant to publication noted in (1) above, for (a) leave to intervene, (b) reopening for further hearing, and (c) reconsideration in light of evidence to be adduced at the further hearing;

(6) Petition of Arkansas-Best Freight System, Inc., in No. MC-94201 (Sub-No. 56), filed March 27, 1972, pursuant to publication noted in (1) above, for (a) leave to intervene, (b) reopening for further hearing, and (c) reconsideration in light of evidence to be adduced at further hearing;

(7) Petition of Dean Truck Line, Inc., in No. MC-94201 (Sub-No. 56), filed March 27, 1972, pursuant to

publication noted in (1) above, for reopening the proceeding for further hearing;

(8) Motion of applicant in No. MC-94201 (Sub-No. 56), filed April 4, 1972, to strike, and (in the alternative to dismiss and reply to the protest-representation in (1) and the petitions in (2), (3), (4), (5), (6), and (7) above;

(9) Petition of Ryder Truck Lines, Inc., protestant, filed May 18, 1972, for reconsideration in Nos. MC-2229 (Sub-No. 132), MC-94201 (Sub-No. 56), and MC-106401 (Sub-No. 18);

(10) Petition of applicant in No. MC-111231 (Sub-No. 67), filed May 18, 1972, for reconsideration;

(11) Joint petition of Mercury Freight Lines, Inc., and East Texas Motor Freight Lines, Inc., protestants, filed May 19, 1972, for reconsideration in Nos. MC-2229 (Sub-No. 132), MC-94201 (Sub-No. 56), and MC-106401 (Sub-No. 18);

(12) Petition of applicant in No. MC-1124 (Sub-No. 206), filed May 22, 1972, for reconsideration and, alternatively, for reopening for further hearing;

(13) Joint petition of Holloway Motor Express, Inc., Consolidated Freightways Corporation of Delaware, Yellow Freight System, Inc., Transcon Lines, and T.I.M.E.-DC, Inc., protestants, filed May 22, 1972, for reconsideration in Nos. MC-2229 (Sub-No. 132), MC-94201 (Sub-No. 56), and MC-106401 (Sub-No. 18);

(14) Petition of applicant in No. MC-11207 (Sub-No. 233), filed May 22, 1972, for reconsideration;

(15) Petition of Jack Cole-Dixie Highway Company, protestant, filed May 22, 1972, for reconsideration

in Nos. MC-2229 (Sub-No. 132), MC-94201 (Sub-No. 56), and MC-106401 (Sub-No. 18);

(16) Joint petition of Campbell Sixty-Six Express, Inc., ET&WNC Transportation Company, and Gordons Transports, Inc., protestants, filed May 22, 1972, corrected and supplemented May 30, 1972, for reconsideration in Nos. MC-2229 (Sub-No. 132), MC-94201 (Sub-No. 56), and MC-106401 (Sub-No. 18);

(17) Petition of Roadway Express, Inc., protestant, filed May 22, 1972, for reconsideration in Nos. MC-2229 (Sub-No. 132), MC-94201 (Sub-No. 56), and MC-106401 (Sub-No. 18);

(18) Petition of Braswell Motor Freight Lines, Inc., protestant, filed May 22, 1972, for reconsideration in Nos. MC-2229 (Sub-No. 132), MC-94201 (Sub-No. 56), and MC-106401 (Sub-No. 18);

(19) Petition of applicant in No. MC-76177 (Sub-No. 304), filed May 22, 1972, for reconsideration;

(20) Petition of Red Line Transfer & Storage Company, Inc., protestant, filed May 22, 1972, for reconsideration in Nos. MC-2229 (Sub-No. 132), and MC-94201 (Sub-No. 56);

(21) Petition of applicant in No. MC-59680 (Sub-No. 147), filed May 22, 1972, for reconsideration;

(22) Late-tendered joint petition of Alamo, Express, Inc., Central Freight Lines, Inc., Eagle Motor Lines, Inc., and Red Arrow Freight Lines, Inc., protestants, filed May 23, 1972, for reconsideration in No. MC-94201 (Sub-No. 56);

(23) Joint reply by 41 shippers, interveners in support in No. MC-106401 (Sub-No. 18), filed June 12,

1972, to the petitions for reconsideration in No. MC-106401 (Sub-No. 18);

(24) Joint reply by Campbell Sixty-Six Express Inc., ET&WNC Transportation Company, Gordons Transports, Inc., and Red Line Transfer & Storage Company, Inc., protestants, filed July 12, 1972, to the petitions in (10), (12), (14), (19), and (21) above;

(25) Reply by applicant in No. MC-2229 (Sub-No. 132), filed August 14, 1972, to the petitions for reconsideration of the grant in No. MC-2229 (Sub-No. 132);

(26) Reply by applicant in No. MC-94201 (Sub-No. 56), filed August 14, 1972, to the petitions for reconsideration in (9) through (21) above;

(27) Joint reply by Mercury Freight Lines, Inc., and East Texas Motor Freight Lines, Inc., protestants, filed August 15, 1972, to the petitions in (10), (12), (14), (19), and (21) above;

(28) Joint reply by Transcon Lines and T.I.M.E.-DC, Inc., protestants, filed August 15, 1972, to the petitions in (10), (12), (14), (19), and (21) above;

(29) Joint reply by Roadway Express, Inc., and Roadway Express, Inc., of Mississippi, protestants, filed August 15, 1972, to the petitions in (10), (12), (14), (19), and (21) above;

(30) Reply by Braswell Motor Freight Lines, Inc., protestant, filed August 16, 1972, to the petitions in (10), (12), (14), (19), and (21) above;

(31) Reply by applicant in No. MC-106401 (Sub-No. 18), filed August 16, 1972, to the petitions for reconsideration of the grant in No. MC-106401 (Sub-No. 18);

(32) Joint petition of Braswell Motor Freight Lines, Inc., Campbell Sixty-Six Express, Inc., Deaton, Inc., Gordons Transports, Inc., and Red Line Transfer & Storage Co., Inc. protestants, filed August 18, 1972, for extraordinary relief under Rule 102 of the Commission's General Rules of Practice, embracing a request for review by the entire Commission;

and good cause appearing therefor:

It is ordered, That the late-tendered joint petition in (22) above be, and it is hereby, accepted for filing.

It is further ordered, That the petition in (32) above be, and it is hereby, rejected for the reason that the proceeding in its present posture is not the proper subject of a plea for relief directed to the entire Commission.

It is further ordered, That the petitions in (1), (2), (3), (4), (5), (6), and (7) above, collectively seeking leave to intervene, and requesting further hearing and reconsideration be, and they are hereby, denied and rejected, respectively, for the reasons (1) that the publication of the grant of authority in No. MC-94201 (Sub-No. 56) was made for the purpose of apprising the interested persons of the additional authorization to use Montgomery, Ala. as a gateway and to serve a specified point in Alabama for purposes of joinder only, which was not included in the notice of authority sought as originally published in the Federal Register issue of August 19, 1965; (2) that the petitioners' stated interests in No. MC-94201 (Sub-No. 56) are generally based either (a) on authority in conflict with the services proposed as set forth in the publication as originally made, and petitioners had ample notice and op-

portunity but failed to file timely protests at the time in the proceeding in which they now assert an interest or, as in the case of petitioner in (6) above, filed a timely protest and later withdrew said protest, (b) on authority acquired by them after the original publication, which authority does not conflict with the additional authorization necessitating republication or which, as in the case of petitioner in (3) above, although it may conflict with the additional authorization, it has not been shown to be prejudiced by the involved portion of the grant requiring republication, or (c) on authority acquired by applicant after the original publication, which authority was considered in the report and which is not relevant to the need for republication; (3) that the petitioners fail to show the extent to which they have been prejudiced, if at all, by the grant of authority to applicant in MC-94201 (Sub-No. 56) to the extent it authorized service at Montgomery, Ala. and a specified point in Alabama for purpose of joinder only; and (4) that, even if intervention were permitted and the proceeding reopened for the receipt of additional evidence relating to the authority acquired by certain of the petitioners subsequent to the original publication, there is no showing that such evidence would warrant a result different than that reached in the report and order of Division 1 with respect to the authorization to serve Montgomery, Ala. and a specified point for purposes of joinder only.

It is further ordered, That in view of the action taken in the next preceding paragraph, the motion in (8) above be, and it is hereby, overruled.

It is further ordered, That the proceeding in No. MC-111231 (Sub-No. 67), be, and it is hereby, reopened for reconsideration on the present record.

It is further ordered, That the petitions in (9) and (11) through (22) above, be, and they are hereby, denied, for

the reasons that the findings of Division 1, in its report and order of December 30, 1971, reported at 114 M.C.C. 571, in Nos. MC-1124 (Sub-No. 206), MC-2229 (Sub-No. 132), MC-11207 (Sub-No. 233), MC-18088 (Sub-No. 36), MC-59680 (Sub-No. 147), MC-76177 (Sub-No. 304), MC-94201 (Sub-No. 56), and MC-106401 (Sub-No. 18), are in accordance with the evidence and the applicable law and that no sufficient or proper cause appears for reopening the proceeding for reconsideration or further hearing.

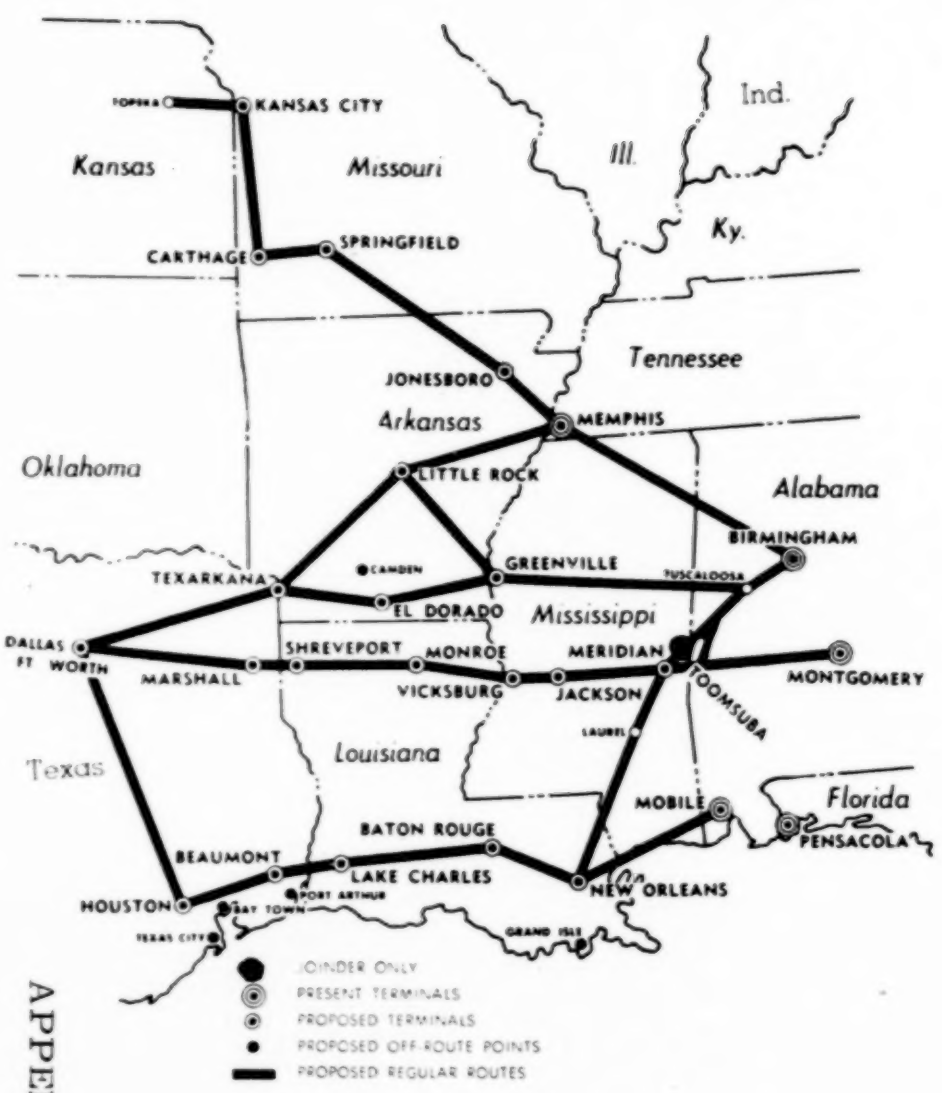
It is further ordered, That, unless compliance is made by applicants in Nos. MC-2229 (Sub-No. 132), MC-94201 (Sub-No. 56), and MC-106401 (Sub-No. 18), with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act, within 90 days after the date of service of this order, or within such additional time as may be authorized by the Commission, the grants of authority made in the report and order entered herein on December 30, 1971, shall be considered as null and void and the applications shall stand denied in their entirety effective upon the expiration of the said compliance time.

By the Commission, Division 1, Acting as an Appellate Division.

Joseph M. Harrington,
(Seal) Acting Secretary.

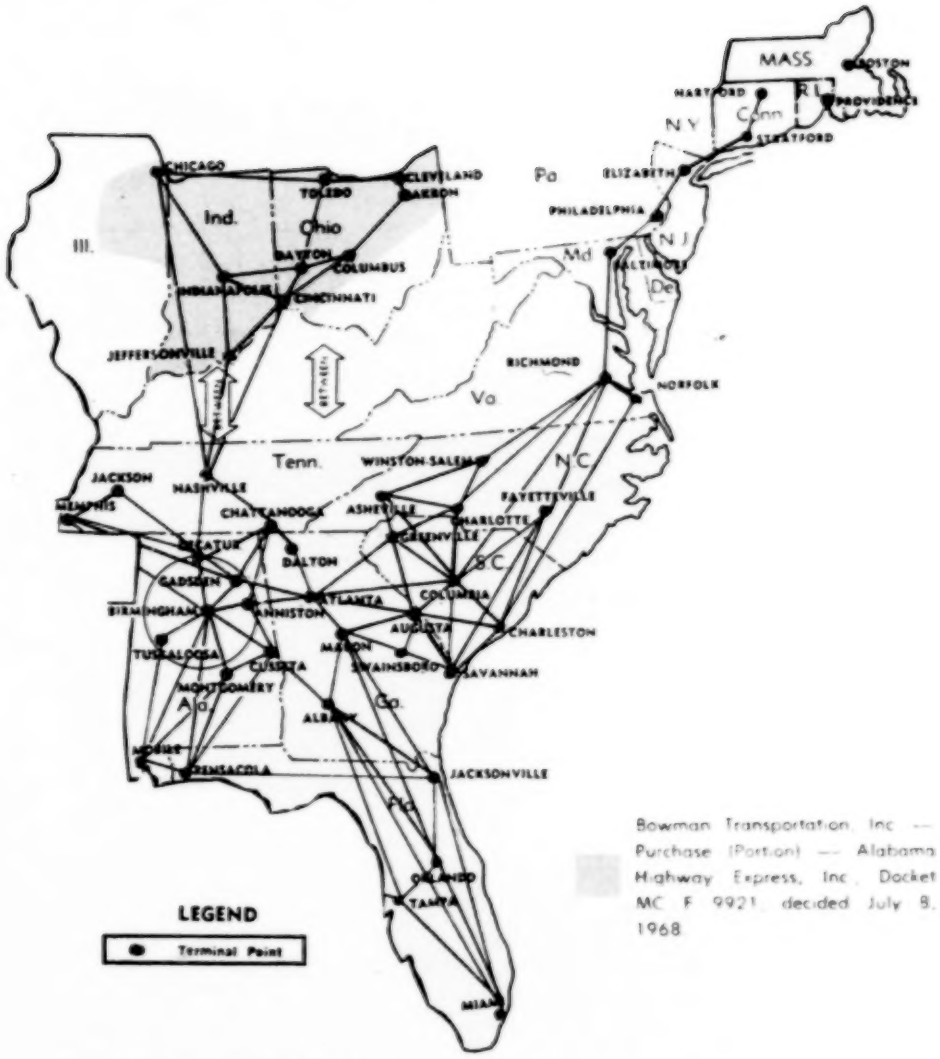
NOTE: This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

APPENDIX D



APPENDIX D

SUB-56 AUTHORITY



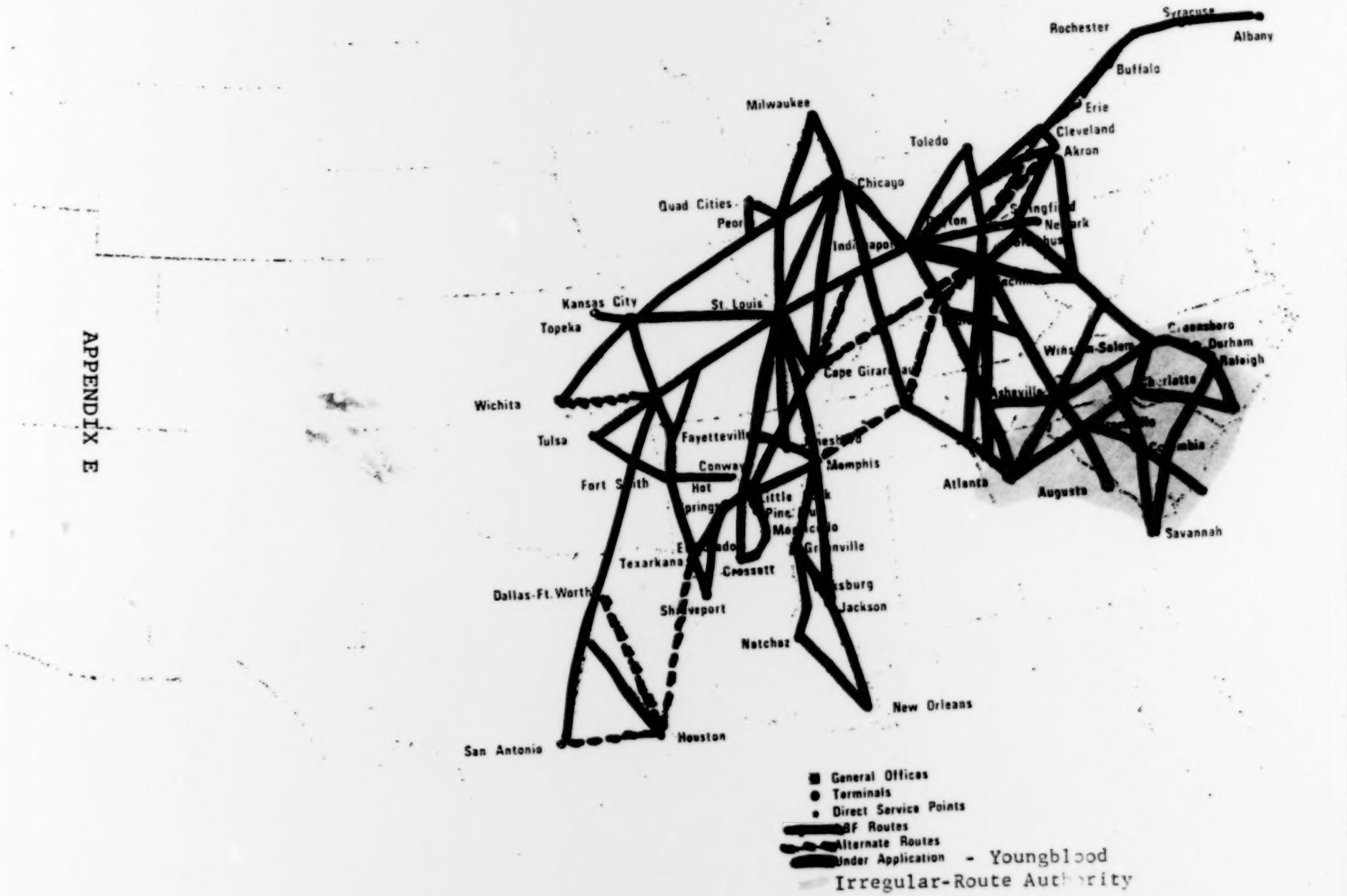
Bowman Transportation, Inc. — Purchase (Portion) — Alabama Highway Express, Inc., Docket MC F 9921, decided July 8, 1968

Service in connection with regular and irregular routes to and from all points in the shaded areas.

PRESENT AUTHORITY

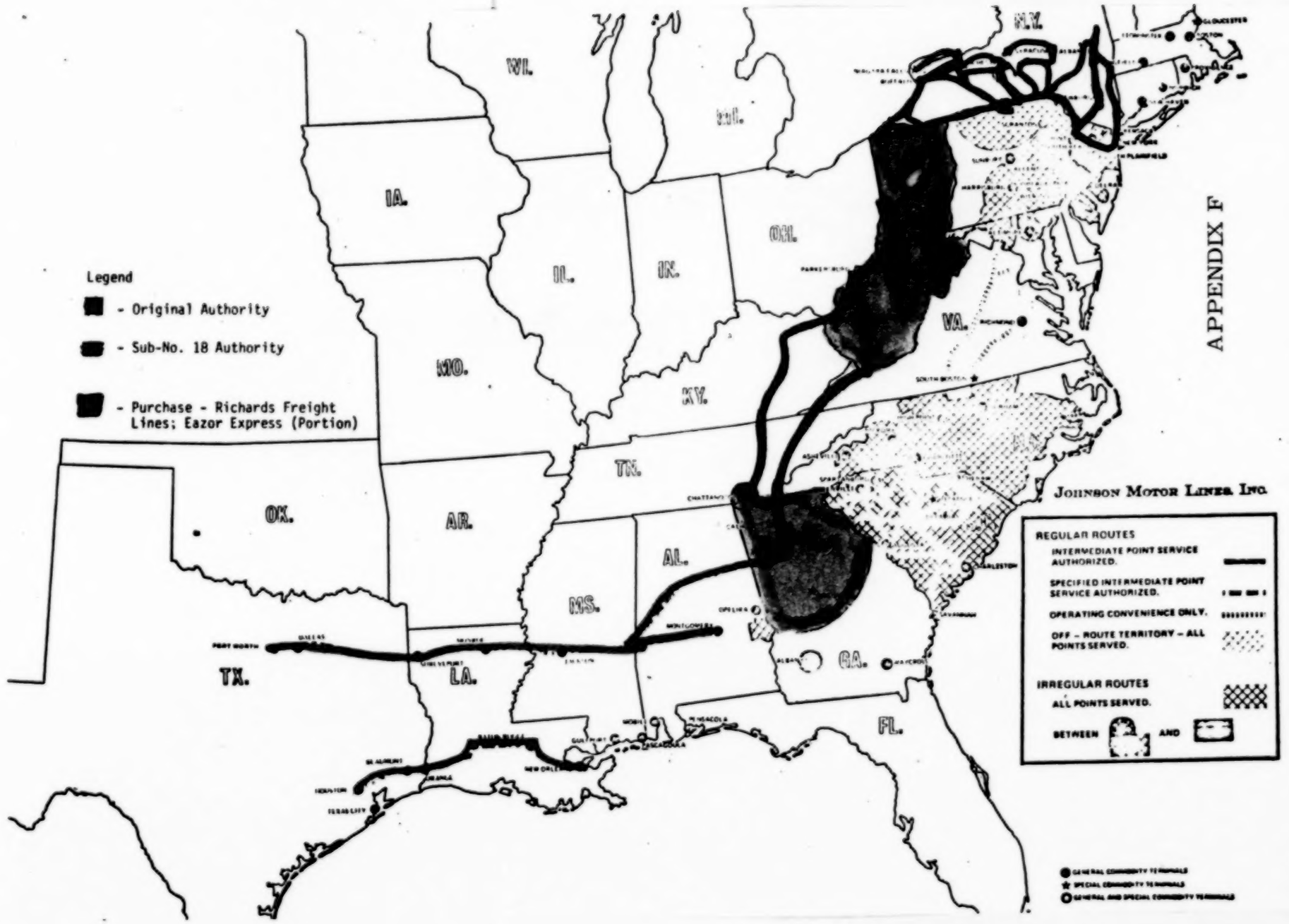
APPENDIX E

APPENDIX E



- Youngblood Irregular-Route Authority

APPENDIX F



APPENDIX F